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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 953

INDUSTRIAL WORKERS OF THE WORLD, ET AL.,
Petitioners,

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on September 26, 1967.

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[1]Plaintiffs below were petitioner, an unincorporated labor union, its officers, and members, referred to in this petition for convenience as petitioner.

OPINION BELOW

The judgment order of the district court denying petitioner's motion for summary judgment and granting respondent's cross motion to dismiss the complaint was not reported. The district court's oral statement of the bases for the order is set out in the joint appendix (p. 31) with the judgment (p. 33). The opinion of the Court of Appeals for the District of Columbia issued on September 26, 1967, is not yet reported and is set out in full in an appendix to this petition.

THE RECORD

A certified copy of the record below has been filed in this Court along with nine copies of the Joint Appendix.

JURISDICTION

This petition is presented for review of the judgment of the Court of Appeals entered on September 26, 1967, and the jurisdiction of this Court is invoked, under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Question Presented by the Petition for Certiorari

Whether: 1. an organization may challenge on constitutional grounds the validity of its designation on the Attorney General's List where the Attorney General did not adopt rules that provided for notice to the organization of its designation within the period provided for objection.

2. the organization can be charged with presumptive notice of the period for objecting to the designation because of a prior designation which was also made without notice to the organization, and where no notice of the new contest period appeared in the prior designation.

3. the Attorney General can refuse to consider petitioner's challenge to the validity of its designation on the grounds that

petitioner failed to object within the period for administrative review where the Attorney General subsequently established an informal administrative review procedure which petitioner has exhausted.

4. where the Attorney General adopts informal review both of the correctness of petitioner's original designation of petitioner and of whether the designation should be continued and the court below finds that the Attorney General was arbitrary in refusing petitioner such informal review, whether the court can order the Attorney General to review only petitioner's continued designation.

Questions to be Presented if Certiorari is Granted

1. Whether the delegation by the President to the Attorney General of the power to adopt rules, make the designations, and publish and maintain the Attorney General's List is overly broad, vague, lacks standard, and fails to give notice of the Attorney General's authority to individuals and organizations affected.

2. Whether the Rules adopted by the Attorney General and the effect of the designation and publication of the List violate:

(a) the freedom of speech and association provisions in the First Amendment, and

(b) the due process of law provision of the Fifth Amendment.

EXECUTIVE ORDERS, REGULATIONS AND INFORMAL REVIEW ADOPTED BY THE ATTORNEY GENERAL, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Executive Orders involved and the regulations and informal review adopted by the Attorney General are: E.O. 9835, 12 Fed. Reg. 1935, the regulations, 28 C.F.R. 41.1(a) et. seq.

(1949), the desi nation of the petitioner and others, 14 Fed. Reg. 2371, E.O. 10450, 18 Fed. Reg. 2489, the regulations, 28 C.F.R. 41.1(a), et. seq. (1953), and provision for redesignation at Sec. 41.11, the redesignation, 18 Fed. Reg. 2741, and the informal review, subsequently adopted Exhibit C (Joint App., pp. 29–30) Par. 8, stipulation of facts, (Joint App. p. 23), Exhibit B (Joint App. p. 10), Opinion (App. p. 4). The constitutional provisions involved are the due process clause of the Fifth Amendment and the freedom of speech and association provisions of the First Amendment. These all are set out in an appendix to this petition.

STATEMENT

The jurisdiction of the district court was invoked under 28 USCA 2281, 1346, and 2201, and 5 USCA 1009.

Petitioner is an unincorporated labor organization designated in 1949 by the Attorney General without notice as an organization "seeking to alter the form of government of the United States by unconstitutional means" and the designation included with a list of organizations under various other categories on the Attorney General's List, under procedure adopted by the Attorney General, 28 C.F.R. 41.1(a) following the President's Executive Order 9835. Under that procedure a designated organization had 10 days to object after the List was published in the Federal Register, without provision for actual notice, and whether or not the organization actually received notice of the designation within the 10 day period. The List was used as a means of determining eligibility of members of listed organizations for federal employment, housing, tax exemption, and other benefits.

In 1953 E.O. 9835 was revoked and E.O. 10450 issued. The Attorney General revised the provisions of 28 C.F.R. 41.1(a) *et. seq.* and provided for actual notice to new organizations to be designated, and for notice of contest within thirty days,

Section 41.1(b). However, organizations previously designated under E.O. 9835 were redesignated without such notice, Section 41.11, and their time for objection limited to ten days from the effective date of E.O. 10450 (Section 41.1(a)). The categories of organization under the first List were dropped, and the List was commonly known as The Subversive List. Petitioner did not file a notice of contest within that period. (The small number of organizations aware of the contest period who objected and whose designations were recalled continued to be carried on the List with a thin line through the name of the organization, without any explanation of the meaning of the line.)

Subsequently, on or about October 6, 1949, petitioner requested review of the designation. The Attorney General replied that he re-examined the designation and denied relief. No hearing was held. Subsequently petitioner continued to request review of the designation and each time the Attorney General replied that he would consider new evidence of why the original designation was incorrect. No reasons for that designation ever were presented to petitioner and each request was denied. The Attorney General later stated to the court in its pleadings in this case that "the concept of administrative review" had been "informally added" to the regulations.

The last invitation for such review occurred in a letter from the Attorney General to petitioner on January 6, 1965 (Ex. C., Joint App. pp. 29–30):

* * *

> Regarding the desire of the membership that this Department take steps to cause the organization to be removed from the list, I should like to observe that some eleven years have now elapsed since the designation under Executive Order No. 10450 became legally effective. It seems extremely improbable that an organization could be properly delisted upon review by the Acting Attorney General if his review were limited to a mere reconsidera-

> tion of the information considered by Attorneys General Clark, McGrath, and Brownell at the time of their respective decisions to designate the organization. Unless some new information is adduced that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate, but unanimous findings of three former Attorneys General.
>
> With specific reference to what steps the membership itself, or their representatives, may take in this matter, as we have stated in the past in answer to similar inquiries on behalf of the Industrial Workers of the World, a petition of the organization requesting delisting will be given careful study and consideration if it presents new information providing a reasonable basis for considering such delisting.

Petitioner replied and enclosed a copy of the opinion in *Thompson v. Immigration and Naturalization Service*, 332 F.2d 167, (7 Cir., 1964). The entire history of the character of the I.W.W. was put into issue by the government in the lower court in that case, *In Re Petition of Thompson*, 209 F.Supp. 494 (D.C.N.D.Ill. 1962) where the organization was found to be "an organization seeking to change the form of government by unconstitutional means." at 498, Fdg. Fact 1–11. This finding was held to be clearly erroneous in the *Thompson* case, and petitioner contended that this judicial determination was superior to the *ex parte* designation by the Attorney General. The Attorney General returned the request and stated (Ex. B.J.A. p. 10):

> [In the letter of January 6, 1964 w]e pointed out that unless some new information is adduced that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate but unanimous findings of three Attorneys General.
>
> The information contained in the petition signed by Carl Keller which you forwarded with your letter does not warrant a review by this department.

This letter also stated that the *Thompson* case was no ground for review. Petitioner promptly filed suit.

In the suit petitioner alleged on constitutional grounds that the notice provisions were inadequate and that the Attorney General was estopped from asserting untimeliness when petitioner was participating in the (informal) administrative review process. Petitioner also questioned the validity of the delegation of power by the President to the Attorney General, and challenged the List on First Amendment grounds.

The case was heard on the pleadings, and on stipulated facts. The district court denied petitioner's motion for judgment on the pleadings, and granted the Attorney General's cross-motion for summary judgment. The ground given for the ruling was that petitioner had failed to file objections within the ten day period. On review the Court of Appeals determined ten days to be too "cabined and confined," but by computing from the effective date of E.O. 10450, found that redesignated organizations had 38 days to object. The Court decided that petitioner had presumptive notice of the redesignation and the period for objection because it had previously been designated under E.O. 9835. The Court came to this conclusion even though the effective date of E.O. 10450 was not contained in the regulations under E.O. 9835. The Court stated that it could not "say it was an abuse of discretion for the District Court to refuse to consider the I.W.W.'s challenges to its 1953 listing." (Opn. App. p. 10) And although the informal review offered by the Attorney General went to the validity of the original designation, based on a determination that the Attorney General had been arbitrary in failing to provide regulations for removal from the list on a change in circumstances, the Court then ordered the proceedings for de-listing of petitioner, in effect conceding for petitioner that the original designation was correct (and that the characterization of the organization and its members as "subversives" was correct, Opn. App. p. 11). Petitioner asks for review of this decision.

REASONS FOR GRANTING THE WRIT

1. Important constitutional questions involved, and conflict with decisions of this Court

(a) The decision below holds that petitioner is barred from challenging the original designation, which affects members of designated organizations adversely in federal employment, housing, and tax exemption, and which characterizes them as members of subversive groups,[2] for failure to object within the time provided by the Attorney General. However, the decision rests on the procedure in 28 C.F.R. 41.1(a) adopted by the Attorney General under E.O. 9835 that was condemned by this Court in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140–141 (1950).

The organizations, including petitioner, designated under E.O. 9835 were redesignated under E.O. 10450 without notice or hearing (although notice provisions were adopted in the C.F.R. for new organizations to be designated). The Court below relied on the original designation as a means of deciding that petitioner had presumptive notice of the redesignation, and thereby could have objected within the time period (Opn. App. 1–3). But as the original designation was without notice, and as the period for contest of the new listing was nowhere contained in the old listing, and therefore constitutionally inadequate,[3] no presumptive notice could be based on that

[2]Emerson, Haber & Dorsen, Political and Civil Rights in the United States, 3rd Ed., 1967, pp. 228, 284, 293, 308 and See Pfister v. Dombrowski 380 U.S. 479, 495–496 (1965).

[3]"the procedure which was found constitutionally wanting in [the Joint Anti-Fascist] case could be fairly characterized as 'action' 'to maim or decapitate' [an organization] on the mere say-so of the Attorney General . . ." concurring opinion of Justice Frankfurter, Hannah v. Larche, 363 U.S. 420, 491 (1959).

"The Attorney General gave the organizations and their members no hearing before he designated the organizations under E.O. 9835." Rudder v. United States, 96 App. D.C., 329, 226 F.2d 51, at 51 (1955).

invalid designation, *Lane v. Wilson*, 307 U.S. 268, 275–276 (1939).

(b) The decision below denies without due process of law a judicial determination of constitutional rights, on the one hand holding an organization barred from suit for untimeliness for exhausting administrative remedies, as required by *DuBois Clubs of America v. Clark*, ... U.S. ... (36 U.S. Law Week 3238, 3238–3239, 12/11/67), and on the other upholds the procedure of the Attorney General which permits an organization to be barred from review without notice, contrary to *United States v. Robel*, ... U.S. ..., (36 U.S. Law Week 4060, 4060–4061, 12/11/67).

The court below held that the Attorney General was arbitrary and capricious (Opn. App. 12) in refusing review for the purpose of delisting. But the decision also holds that the "concept of administrative review" added informally to the regulations by the Attorney General is limited to removal from the List on a showing by the organization of a change in circumstances. This decision requires a concession by the organization that the original designation was correct. It is also contrary to the review offered by the Attorney General when he invited new information that could be "adduced to cast doubt upon the original decision to designate." (Ex. C., J.A. 29 at p. 30 and Ex. B, J.A. p. 10).

(c) The Attorney General invited petitioner to submit evidence to review the original designation. The court below held that the trial court had discretion as to whether or not to hear petitioner's case. However, the Attorney General should be barred by estoppel from asserting untimeliness, *Honda v. Clark*, 18 L.Ed. 244, 254 (1967). To invite an organization to exhaust administrative review and later claim that the time ran for suit is arbitrary, *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964). The administrative procedure condoned, and the holding that there was judicial discretion,

both are departures from the accepted and usual course of judicial proceedings and so far sanctioned such a course in the lower court as to call for an exercise of this Court's power of supervision.

(d) The delegation of power from President to the Attorney General was without standards, was overly broad, and vague, and the Attorney General has assumed power to proceed under regulations and practices *ex parte, National Lawyers Guild v. Brounoll*, 96 U.S. App. D.C. 252, 225 F. 2d 552, 555 (1955).[4] These adversely affect many individuals in their right to federal employment and to other benefits[5] under a loyalty-security program which inhibits freedom of speech and association, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950), supra, concurring opinion of Justice Black, p. 142, and which has defamed individuals and organizations, Justice Burton, p. 139, and condemned as guilt by association, *Weiman v. Updegraff*, 344 U.S. 183 (1952), in violation of due process of law of the organization and its members, and affords less than the proceeding under the Subversive Activities Control Board, 50 U.S.C. 781, et. seq., 28 C.F.R. 201.9 concurring opinion of Justice Brennan, *United States v. Robel*, ... U.S. ... (36 U.S. Law Week 4060, 4063–4067, 12/11/67).

[4]See, in contrast, Appendix to the opinion in Hannah v. Larche, 363 U.S. 420 (1959), *supra*, at pp. 454–485, listing the hearing procedures, before the various federal agencies and setting out the right to notice, hearing, and cross-examination.

[5]See Note 2, *supra*. In the standard federal employment form, this question appears:

"Q. 27. Are you now or have you ever been a member of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?"

Presumably, a designation under E.O. 10450 would require an affirmative answer.

Conclusion

For the reasons set out above petitioner asks this Court to grant review and to reverse the Court below.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,586

INDUSTRIAL WORKERS OF THE WORLD, ETC., ET AL.,
APPELLANTS

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided September 26, 1967

Mr. Marshall Patner for appellants. *Mr. William Brackett* also entered an appearance for appellants.

Mr. Kevin T. Maroney, Attorney, Department of Justice, with whom *Assistant Attorney General Yeagley*, *Mr. George B. Searls* and *Mrs. Lee B. Anderson*, Attorneys, Department of Justice, were on the brief, for appellee.

Before DANAHER, LEVENTHAL and ROBINSON, *Circuit Judges*.

LEVENTHAL, *Circuit Judge:* This case presents problems arising out of the establishment and maintenance of the so-called "Attorney General's List." Relying on various federal statutes, President Truman in 1947 issued Executive

Order No. 9835, 12 Fed. Reg. 1935, establishing an Employees Loyalty Program in the Executive Branch of the Government. By this order the Attorney General was directed to furnish the Loyalty Review Board with the names of each foreign or domestic organization or association which he, after "appropriate investigation" designated as fascist, communist, totalitarian, or otherwise subversive. Thereupon the Board was instructed to disseminate this information to all federal departments and agencies. In 1949 the Attorney General cited the Industrial Workers of the World (IWW), appellant herein, as such an organization seeking to alter the form of government of the United States by unconstitutional means. *See* 14 Fed. Reg. 2371 (1949).

On April 27, 1953 President Eisenhower revoked Executive Order No. 9835, replacing it with Executive Order No. 10450, [18 Fed. Reg. 2489]. This new order somewhat refined notions of loyalty to make "security" the ultimate aim of the program. The new order continued the directive that the Attorney General compile and maintain a list of subversive organizations, but provided that he was to communicate this information directly to heads of departments and agencies. Pursuant to this directive, the Attorney General on April 29, 1953, 18 Fed. Reg. 2741, redesignated the organizations previously listed under the prior Executive Order, including the IWW. The Attorney General accompanied the redesignation with regulations setting forth procedures for prompt challenge to a proposed listing. Under the new regulation any organization whose listing was carried over from the previous determination was given ten days from the effective date of Executive Order No. 10450 (May 27, 1953) to file a written notice that it contested such listing. *See* 28 C.F.R. § 41.1(a) (1967). Failure to file such a notice of contest was declared to be "an acquiescence in such designation."[1]

[1]Membership in a listed organization is a factor used in weighing qualifications for federal employment, federally financed housing, and other federally created benefits. (JA 27) There is also a suggestion that because of the wide circulation of the list, it has had some impact on state and private employment and benefits. (JA 4)

The IWW made no such objection within that ten day period. Although the IWW kept up correspondence with the Attorney General intermittently over the years protesting its inclusion in the Attorney General's List, no court challenge to the organization's listing was made until the present action was instituted in 1965. The Attorney General then raised the defense of laches, contending that the exchange of letters over twelve years did not keep alive any objection to the 1953 listing. The District Court dismissed the action on the ground that the administrative remedies available with respect to the 1953 listing had not been exhausted.

We do not consider the merits of the IWW's claims that the procedures for listing allegedly subversive groups fatally offend the First and Fifth Amendments. Compare *Joint Anti-Fascist Refugees Comm. v. McGrath,* 341 U.S. 123 (1951), with *National Lawyers Guild v. Brownell,* 96 U.S. App.D.C. 252, 225 F.2d 552 (1955), *cert. denied* 351 U.S. 927 (1956), and *Association of Lithuanian Workers v. Brownell,* 101 U.S.App.D.C. 73, 247 F.2d 64, *vacated as moot,* 355 U.S. 23 (1957). We conclude that the failure to object within the allotted period to the 1953 listing precludes any judicial determination at this time that that listing was unlawful.

A 10-day period would be too "cabined and confined" to suffice as the exclusive opportunity for asserting a constitutional right available to a body of citizens whose circumstances do not encourage initiative and enterprise. *Lane v. Wilson,* 307 U.S. 268, 276 (1939). But it was reasonable for the Attorney General to assume that different considerations were properly applicable to persons already "organized" for expression of political views, if not more comprehensive purposes, and presumptively acquainted with rights and remedies.[2] In this context we note that since the IWW was a re-listed organization, it in fact had a period of 38

[2] *Cf.* Yakus v. United States, 321 U.S. 414 (1944).

days to file its objection,[3] and further note that although the IWW has objected to the procedures on the ground that they do not require actual notice of listing, there is no contention that the IWW was not in fact aware of the Attorney General's determination to continue listing it as a subversive organization in time to raise a contest.

That, however, is not the end of this case. Although the regulations issued on the heels of Executive Order 10450 provide in considerable detail for the mechanics of notice and hearing when a listed organization raises a timely challenge to the listing, within ten days of its effective date, *see* 28 C.F.R. §§ 41.1-.11 (1967), there is not a public suggestion, How, if ever, a listed organization may subsequently exonerate itself, if perchance it did not object within the ten day period. The stipulation of undisputed facts entered into between the parties recites:

> 8. Because neither the Executive Order nor the Rules issued thereunder provide a procedure for an organization's removal from the list of those designated, the defendant [Attorney General] has informally added to the above Rules the concept of administrative review upon a showing of a material change in the character of the organization or newly discovered material evidence. (JA 23)

The Attorney General assures us that "although the regulations do not provide a procedure for removing an organization from the list, defendant would, of course, afford further administrative proceedings to a designated organization upon a showing of a material change in the character of the organization or any substantial new and material evidence." (Brief for Appellee at 2.) The Attorney General correctly

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[3]Executive Order No. 10450 was promulgated on April 27, 1953, to become effective thirty days later on May 27, 1953. On the 29th of April, the Attorney General published in the Federal Register, 18 Fed. Reg. 2619, the rules of procedure for the federal employee security program. These rules announced that previously listed organizations could file contests to relisting within ten days after the (May 27) effective date of the Executive Order.

characterizes this technique of administrative review and reconsideration as "informal," since its origin and establishment appear only in correspondence with listed organizations. The decision as to what constitutes a "material change in the character of the organization" or "substantial and new material evidence" is apparently made ex parte by the Attorney General, and he has articulated no standards to guide his judgment on such questions.

We note that because of its failure to raise an objection to the 1953 listing within the period specified in the 1953 regulation, the IWW has never been advised what the substantive basis was for the determination to list it as a subversive organization. In such a context, a bare requirement that a listed organization demonstrate to the Attorney General's satisfaction that there is "new" material evidence or a material "change in the character" of the organization emerges as something less than a wholly satisfactory administrative remedy.

We need not pass at this point on whether the informal review the Attorney General assures us he makes available in this context is adequate.[4] The IWW does not raise that precise challenge. This is an area where First Amendment guarantees of freedom of speech, press, and political association are involved, however, and we consider this issue open in the further proceedings which we are ordering.

In any event, in this case we find that the IWW has resorted to what has thus far appeared as an administrative remedy, and despite the silence of the District Court on this aspect of the case, the IWW has, we think, timely raised a justiciable objection that the Attorney General's denial of relief was arbitrary.

We have referred to an irregular course of correspondence between the IWW and the Attorney General, dating at least from January 1954, in which the IWW continued to object

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[4] *Compare* Silver v. McNamara, 111 U.S.App.D.C. 334, 296 F.2d 591 (1961).

to its listing and the Attorney General consistently relied on the IWW's default in failing to protest within ten days of the listing in 1953. Of particular significance is the exchange of letters that began on December 23, 1964, when counsel for the IWW wrote to the Attorney General seeking information about the steps necessary to secure removal of the organization from the subversive list. On January 6, 1965, the Assistant Attorney General, Internal Security Division, responded that it seemed "extremely improbable that an organization could be properly delisted upon a review by the Acting Attorney General if his review were limited to a mere reconsideration of the information considered by Attorneys General [Tom C.] Clark, McGrath and Brownell at the time of their respective decisions to designate the organization." The letter proceeded to advise the IWW once more though that "'a petition of the organization requesting delisting will be given careful study and consideration if it presents new information providing a reasonable basis for considering such delisting." (JA 29-30)[5]

Then on February 13, 1965, the IWW submitted a letter styled "Petition" formally requesting delisting, or in the alternative seeking at least a hearing in support of the petition. The principal thrust of the petition, evidently designed to meet the Attorney General's precondition of "new material evidence" respecting the character of the organization was reliance on the May 21, 1964 decision of the Seventh Circuit in the case of *Thompson v. Immigration and Naturalization Service,* 332 F.2d 167, reversing *In re Thompson's Petition,* 209 F.Supp. 494 (N.D. Ill. 1962). There the District Court had rejected a naturalization petition on the ground that the petitioner was a member of the IWW, and that the IWW was an organization advocating the alteration of the American government by unconstitutional means.

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[5]This presumably was in the same vein as the Attorney General's informal assurance that "you may . . . submit for review any information you deem pertinent concerning the policies and objectives of your organization at this time." (Letter dated July 7, 1956, JA 23.)

The District Court sought to support its view with copious references to the literature of the IWW. The Seventh Circuit reversed this finding with the terse notation that it was "clearly erroneous" (332 F.2d at 170), relying on its rejection of a similar finding as to the Socialist Workers Party in *Scythes v. Webb*, 307 F.2d 905 (7th Cir. 1962).[6] Since the court also rejected a separate point argued in the alternative by the Government, it reversed the order denying naturalization.

As support for its request in the alternative for a hearing on the merits of the original listing, the IWW claimed that the January 6, 1965 letter from the Assistant Attorney General inviting submission of new evidence on the validity of the listing constituted a waiver of the ten day limitation period.

Shortly after this Petition was filed, the Attorney General denied all relief. His letter referred to the earlier assurances that new information providing a reasonable basis for delisting would be given careful consideration, but concluded: "[T]he information contained in the petition . . . which

[6]In the *Scythes* case the Seventh Circuit held that ambiguous and abstract passages in party literature do not suffice to characterize an organization as one advocating the violent overthrow of the government. The court relied on Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961), stating that although the government's burden of proof was less in a deportation case (like that of *Scythes*) than in a prosecution under the Smith Act, there was no material difference in regard to the test for determining whether an organization advocates or teaches the violent overthrow of the government.

In *Thompson* the court did not rest its decision on the ground of the hearing or peculiar burden resting on the government in naturalization cases but rather, as appears from its reference to *Scythes*, on the ground of error in the ultimate standard used in the Department of Justice, i.e. by the naturalization examiners, and adopted by the District Court, for determining whether an organization advocated the violent overthrow of the government. One judge would have affirmed the denial of naturalization on another ground; he did not dissent from the court's ruling as to the nature of the IWW.

you forwarded . . . does not warrant review by this Department. In addition the case of *Thompson v. Immigration & Naturalization Service,* 332 F.2d 167 (1964), is not in point since it relates to a petition for naturalization by an individual. In this connection it should be pointed out that the Socialist Workers' Party remains an organization designated pursuant to Executive Order 10450, even though in a deportation proceeding *Scythes v. Webb,* 307 F.2d 905 (1962), the United States Court of Appeals for the Seventh Circuit found, under the standard before laid down, that there was no substantial evidence in the record that the Socialist Workers' Party advocates or teaches the violent and forceful overthrow of the Government of the United States."

On May 4, 1965, the IWW finally resorted to the courts. In addition to urging that the court declare the original listing void on the ground that it violated restrictions on the delegation of powers and offended constitutional guarantees of notice and hearing, it insisted that the Attorney General had waived the ten-day requirement, and—importantly—averred that the Attorney General's rejection of the February 12 petition was "arbitrary and capricious." The IWW added that it had exhausted its administrative remedies, and requested the court to order the Attorney General to grant a hearing, grant an injunction against further listing, and provide "such other and further relief as is just."

In his answer, in addition to raising the defenses of laches and failure to exhaust administrative remedies, the Attorney General denied the charge of arbitrary and capricious rejection of the petition (JA 17). In its motion for judgment on the pleadings, the IWW repeated its contention that the Attorney General's "action was arbitrary and capricious" in that he "summarily refused the petition and evidence." In his counter motion for summary judgment or dismissal, the Attorney General alleged that the decision in *Thompson* "is entirely irrelevant and immaterial to the designation of the plaintiff organization under Executive Order No. 10450." (JA 20) Once more, in opposing the Attor-

ney General's motion, the IWW averred that "specific arbitrary and capricious actions of the defendant include: Specific refusal to consider the decision . . . in *Thompson v. I.N.S.*, . . . the only proper relevant determination ever made of the character" of the IWW.

The District Court recognized that some broad constitutional issues were involved, but held there was no occasion to reach them. As the sole explanation for the denial of the IWW's prayers for relief and the grant of the Attorney General's motion for summary judgment, the court ruled that "by failing to exhaust its administrative remedy [of contesting the listing within ten days] the plaintiff has precluded itself from pursuing a judicial remedy."

We approve of the denial of relief premised on alleged infirmities in the 1953 listing of the IWW as a subversive group. In addition to the failure to exhaust administrative remedies,[7] the Attorney General raised the equitable defense of laches, which includes the two-fold elements of reasonable delay and likelihood of prejudice to the defendant. Here it was set forth in the statement of facts as to which there is no material dispute that the IWW had "no legal excuse for their delay of twelve years in seeking a judicial determination of their allegations relative to their designation under Executive Order No. [0450" and that it "is reasonable to presume that entertaining this suit would give rise to numerous similar suits by others of the nearly three hundred organizations designated under Executive Order No. 10450." It is also reasonable to assume that this delay would severely complicate the ability to adduce evidence available when the original determination was made.

The District Court accompanied its judgment with a brief, oral statement that appellant's failure to exhaust its admin-

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[7] *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 450-58 (abr. ed. 1965).

istrative remedies precluded pursuit of a judicial remedy. We have approved the refusal to provide judicial relief when a listed organization deliberately by-passed administrative channels. See *National Council of American-Soviet Friendship v. Brownell,* 100 U.S.App.D.C. 116, 243 F.2d 222 (1957). We cannot say it was an abuse of discretion for the District Court to refuse to consider the IWW's challenges to its 1953 listing.

That determination, however, does not dispose of the case, and herein lies the District Court's error. To say that the IWW can no longer demand a judicial hearing on the validity of the 1953 listing is a far cry from concluding that the organization is eternally ousted from resort to the courts for other, subsequent complaints. It is settled that justiciable rights are involved here. See *Joint Anti-Fascist Refugee Comm. v. McGrath, supra.* First Amendment rights are at stake. In such a situation we think the chief law officer of the United States is under a legal duty to adhere to minimal standards of fairness and reasonableness when he acts.

Even where an organization failed to exhaust the administrative remedy provided by the regulation, this court concluded that an additional period should be provided to an organization that had made clear its non-acquiescence in the listing. *Joint Anti-Fascist Refugee Committee v. Brownell,* 94 U.S.App.D.C. 341, 215 F.2d 870 (1954).

Here we have another issue—the action on appellant's petition for delisting in the light of developments subsequent to 1953, namely the Seventh Circuit's 1964 ruling in *Thompson.* That decision is not necessarily dispositive of the complaint before us. The Attorney General asserts that it is "entirely irrelevant and immaterial" to the designation of the IWW, but this is the determination that the organization claims is arbitrary and wishes a court to examine. It argues in the alternative that the *Thompson* decision provides at least sufficient momentum to entitle it to an administrative hearing on its prayer for discontinuance of the listing.

The District Court withheld consideration on the merits of the claim that the refusal was arbitrary, but we believe the IWW was entitled to judicial consideration of that issue. This entails at least a careful analysis of the *Thompson* litigation. Ultimate resolution may come to require some consideration of the factual background for appellant's designation, for this may be decisive in determining whether it was indeed capricious to term the *Thompson* ruling "entirely irrelevant." The problem is not a simple one. It is clear enough that reasonable consideration must be given to new evidence. Apparently the Attorney General would also agree that reasonable consideration must be given to newly announced legal doctrine. Such consideration is available in a court notwithstanding an earlier decision in the same controversy put forward as the law of the case.[8] The *Thompson* decision is a third category—the appearance of a new judicial determination of the ultimate legal significance of relevant evidence, a determination that may embody both factual inferences and changing legal concepts.

We do not now intimate any view on the merits of this allegation other than to hold that it adequately raises an issue that the District Court ignored. Since 1953, when the last deliberate decision to list the IWW as a subversive group was made, there has been a considerable development in public and judicial attitudes toward control of subversives.[9]

While none of the decided cases precisely involves the issues the District Court is to consider on the remand, their approach may have some relevance in determining whether

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[8]Naples v. United States, 123 U.S.App.D.C. 292, 359 F.2d 276 (1966).

[9]*See e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); United States v. Brown, 381 U.S. 437 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Communist Party v. SACB, 367 U.S. 1 (1961); Kent v. Dulles, 357 U.S. 116 (1958); Yates v. United States, 354 U.S. 298 (1957).

the Attorney General's conduct must be held arbitrary and capricious. We think the District Court, having judicial jurisdiction,[10] should have the first opportunity to address itself to this question, with such further amplification by the parties as the court in its sound discretion deems advisable.

The order granting summary judgment in favor of the Attorney General is affirmed insofar as it declines to review the 1953 listing. In regard to appellant's claim that the Attorney General acted arbitrarily on its 1965 petition for delisting, the order is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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[10]The Attorney General challenges, *inter alia*, judicial jurisdiction, on the principle that this is in effect an unconsented-to suit against the United States. That issue was settled in the IWW's favor by *Joint Anti-Fascist*. The Attorney General argues that the IWW has pointed to no statutory provision consenting to suit against the Attorney General in his official capacity. Although we agree that general grants of judicial jurisdiction are not usually construed as consent to suit, the IWW in its complaint squarely relied on Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. II, 1965-66), which accords a right to judicial review to "a person suffering legal wrong because of agency action" (§ 702). "Agency" is defined as "each authority of the Government of the United States," except for irrelevant exceptions (§ 701(b)(1)). In the absence of any specified form of proceeding, review may be had by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction" (§ 703). And Section 706 broadly directs the courts, to the extent necessary, to decide questions of law, interpret constitutional and statutory provisions, "compel agency action unlawfully withheld or unreasonably delayed," and hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." If consent to suit there must be consent to suit there here is.

DANAHER, *Circuit Judge, dissenting:* To the extent that my colleagues find no error in the order under review I would agree, but there I would stop. I think this case should not be remanded for any purpose.

Listed pursuant to the 1947 Executive Order No. 9835, and further listed after the 1953 Executive Order No. 10450, these appellants at neither time took the steps available to them to contest their designation. No timely challenge was levied against the orders or the regulations issued pursuant thereto. No administrative relief was sought. No judicial relief was asked. My colleagues acknowledge, as they must, that the District Court did not abuse its discretion in rejecting the appellants' present attack upon designation following Executive Order 10450, *National Council of American-Soviet F. v. Brownell*, 100 U.S. App. D.C. 116, 243 F.2d 222 (1957).

But, some twelve years having elapsed since the designation, my colleagues say they can now discern that a justiciable controversy has emerged. Although no allegations had been submitted to the Attorney General to suggest a "material change in the character of the organization," and there had been no showing of "newly discovered material evidence," or why it is only now "newly discovered," my colleagues would cause this case to be reopened. Neither in their correspondence nor in the record had the appellants proffered compliance with the basis upon which the Attorney General said he would be moved to act.

Let them, even now, not on their own terms but on his, meet the conditions upon which the Attorney General said *he* would entertain reconsideration. This is no case for this court's intervention on the record now before us.

I dissent.[1]

[1] And insofar as the majority seems to find that Thompson v. Immigration & Naturalization Service, 322 F.2d 167 (7th Cir. 1964) has somehow infused new life into the defunct claim here resurrected, I suggest a mere reading of the opinion will demonstrate that a completely distinguishable issue was there presented. I agree with the Attorney General's conclusion that what was there decided in 1964 was "entirely irrelevant" to the designation of the appellant organization in 1953.

APPENDIX

1. Section 9A of the Hatch Act (53 Stat. 1148, formerly 5 U.S.C. 118j), repealed but essentially reenacted as Section 118p of Title 5 by Act of August 9, 1955, Sections 1 and 4 (2), 69 Stat. 624–625), provided as follows in pertinent part:

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

2. Public Law 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22–1, *et seq.*), provides as follows in pertinent part:

> AN ACT To protect the national security of the United States by permitting the summary suspension of employment of civilian officers and employees of various departments and agencies of the Government, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when

deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services * * *.

3. Part III, Paragraph 3 of Executive Order 9835 of March 21, 1947 (12 F.R. 1938) provides as follows:

> 3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.
>
> a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

4. Executive Order 10450, effective May 27, 1953 (18 F.R. 2489), provides as follows in pertinent part:

> WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and
>
> WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be

employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 188j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22–1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * * *

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * * *

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

* * * * *

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

* * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

* * * * *

SEC. 15. This order shall become effective thirty days after the date hereof.

5. The Attorney General's Rules of Procedure for the federal employee security program (Department of Justice Regu-

lations of April 29, 1953, 18 F.R. 2619, 28 CFR, 1956, Supp., Part 41) provide as follows:

DESIGNATION OF ORGANIZATIONS IN CONNECTION WITH THE FEDERAL EMPLOYEE SECURITY PROGRAM

By virtue of the authority vested in the Attorney General by section 22 of Title 5 of the United States Code, and by Executive Order No. 9835 of March 21, 1947, and Executive Order No. 10450 of April 27, 1953, I hereby prescribe the following rules of procedure with respect to notice, hearing, and designation of organizations in connection with the Federal employee security program:

Sec.

41.1 Notice to and by organizations
41.2 Statement and interrogatories by Attorney General
41.3 Reply by organization
41.4 Request for hearing
41.5 Notice of hearing
41.6 Default
41.7 Hearing board or officer
41.8 Hearing
41.9 Recording of testimony
41.10 Determination

AUTHORITY: §§41.1 to 41.11 issued under R.S. 161; 5 U.S.C. 22, E.O. 9835, Mar. 21, 1947, 12 F.R. 1935; 3 CFR, 1947 Supp.; E.O. 10450, Apr. 27, 1953, [18] F.R. 2489 [3 CFR, 1953 Supp.].

SECTION 41.1 *Notice to and by organizations.*—(a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D.C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization

pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D.C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the FEDERAL REGISTER, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the FEDERAL REGISTER, such organization may file with the Attorney General, Department of Justice, Washington, D.C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the FEDERAL REGISTER.

(c) The notice of contest provided in this part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

SECTION 41.2 *Statement and interrogatories by Attorney General.*—Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

SECTION 41.3 *Reply by organization.*—The organization, within sixty days following receipt of such statement

and interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

SECTION 41.4 *Request for hearing.*—Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

SECTION 41.5 *Notice of hearing.*—Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

SECTION 41.6 *Default.*—When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

SECTION 41.7 *Hearing board or officer.*—For the purpose of conducting any hearing as provided in this part the Attorney General shall assign such officer or board as he shall deem necessary.

SECTION 41.8 *Hearing.*—(a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this part it appears to the board or hearing officer that a determination may appropriately

be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may by received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination provided that no witness

on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

SECTION 41.9 *Recording of testimony.*—The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made a part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

SECTION 41.10 *Determination.*—Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

SECTION 41.11 *Previous designations not affected.*—The promulgation of the rules of procedure contained in this part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 953

INDUSTRIAL WORKERS OF THE WORLD, ET AL., PETITIONERS

v.

RAMSEY CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN OPPOSITION

Petitioners seeks review of a decision of the Court of Appeals for the District of Columbia Circuit which held that they were barred by laches and for failure to exhaust administrative remedies from contesting the validity of the actions of the Attorney General in 1949 and 1953 listing petitioner Industrial Workers of the World as an organization seeking to alter the form of government of the United States by unconstitutional means. The court below did hold, however, that petitioners were entitled to maintain an action in the district court to compel the Attorney General to hold a hearing to determine whether the continued

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listing of I.W.W. was arbitrary and unreasonable in light of the decision of the Court of Appeals for the Seventh Circuit in *Thompson* v. *Immigration and Naturalization Service,* 332 F. 2d 167. The court below, therefore, remanded the case to the district court for further proceedings.

Petitioner I.W.W. was originally listed as an organization seeking to alter the form of the government of the United States by unconstitutional means in 1949 pursuant to Executive Order 9835. Public notice of the listing was given in the Federal Register, 14 F.R. 2371, and petitioners admit having actual notice of the listing at least as early as July 7, 1949 (J.A. 22). Subsequent to this Court's decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, I.W.W. was redesignated under Executive Order 10450. Public notice of the redesignation was given by publication in the Federal Register, 18 F.R. 2741, on May 12, 1953. Pursuant to regulations adopted by the Attorney General, I.W.W. was given an opportunity to challenge the proposed designation by filing a notice of contest, but, when it did not file such a notice within the time prescribed, it was deemed to have acquiesced in the designation. I.W.W.'s default in failing to file a notice of contest was specifically brought to its attention by letters of January 13, 1954, February 1, 1954, July 31, 1956, April 22, 1957, and January 13, 1960 (J.A. 23–24). Yet, the complaint in the present action was not filed until May 4, 1965, although it was conceded by petitioners in the district court that they "have no legal excuse for their delay of twelve years in seeking a

judicial determination of their allegations relative to their designation under Executive Order No. 10450." (J.A. 1, 24.)

On these facts, the court below was clearly correct in holding that petitioner's challenge to the designations which occurred in 1949 and 1953 was barred by laches and by petitioners' failure to exhaust the administrative remedies. Petitioners have failed to establish any reason why the Attorney General should now be put to the burden of proving that action taken by one of his predecessors some fourteen years ago was correct, or why their failure to seek redress for a period of twelve years should be excused. See *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841; *Landell* v. *Northern Pac. Ry. Co.,* 122 F. Supp. 253 (D. D.C.), affirmed, 223 F. 2d 316 (C.A.D.C.), certiorari denied, 350 U.S. 844. See, also, *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552, certiorari denied, 351 U.S. 927.

It should also be noted that the decision of the court below held that petitioners are entitled to have the district court consider whether the Attorney General should be compelled to hold a hearing to determine whether the continued listing of the I.W.W. is reasonable. The court of appeals recognized that a resolution of that question may require "some consideration of the factual background for [petitioner I.W.W.'s] designation." The court also concluded that "consideration must be given to new evidence" and "that reasonable consideration must be given to newly announced legal doctrine." (Pet. App. 11.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1968.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 953

INDUSTRIAL WORKERS OF THE WORLD, ET AL.,
Petitioners,

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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INDUSTRIAL WORKERS OF THE WORLD, ET AL.,
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v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner is entitled to review of the listing procedure and to a reversal because that procedure violated due process requirements and because members of listed organizations are subject to continuing harm by the original listing. The government seeks to avoid review relying solely on an argument of laches, but the government is in error putting forth this argument. The courts below rejected laches as the basis for their rulings and laches is not supported by the record. The courts below held that failure to file objections within the time pre-

scribed barred review. That was error because the redesignation continued to violate due process contrary to what this Court said in the *Joint Anti-Fascist* case.

1. The Courts below were correct when they rejected the government's argument of laches, but erred holding that petitioner was barred from attacking the original listing for failure to file within the time period for administrative review.

The Court below held that petitioner had failed to object to the listing within the time period for administrative review (Opinion, Appendix pp. 1–4), and that upon such failure, the trial court did not abuse its discretion in relying on this ground (Opinion, Appendix, pp. 9–10). The Court decided that the period on the face of the Attorney General's regulations which was 10 days for objecting was too "cabined and confined," *Lane v. Wilson*, 307 U.S. 268, 276 (1939), but decided that petitioner had 38 days to object, even though there was no actual notice during that period. That is a construction by the Court in order to apply that supposedly larger period against petitioner, and this is contrary to *Cole v. Young*, 351 U.S. 536 (1956) at p. 556, which holds that these same regulations adopted under Executive Order 10450 are to be construed against the Attorney General.

2. Laches is not supported by the record.

The government misapprehends the record when it relies on laches.

a. Petitioner was not guilty of Laches.

Laches requires unexplained delay, and harm to the opposing party. The delay here was necessary to exhaust administrative review by the invitation of the Attorney General of informal review. As soon as review ended, petitioner filed suit, and this is not delay that would support laches, *Duncan v. Summerfeld*, 251 F. 2d 896,897 (D.C. Cir. 1957). *Jones v. Sum-*

merfeld, 265 F. 2d 124 (D.C. Cir. 1959), where no such reason for delay appeared in the record is therefore distinguished. Further, the *Jones* case does not apply as this Court held that there are special rules in employment cases, *Arant v. Lane*, 249 U.S. 367, (1919), 372, and this is not an employment case.

In addition, no harm to the Attorney General is claimed. Instead all that the government says here is (Memorandum p. 3):

> "Petitioners have failed to establish any reason why the Attorney General should now be put to the burden of proving that action taken by one of his predecessors some fourteen years ago was correct, . . ."

However, the Attorney General is charged with the action of his predecessor, *H.S.D. Co. v. Kavanagh*, 191 F. 2d 831, 6 Cir., 1951, 846, and this bold statement is not a substitute for the requisite showing of harm. Instead of harm by delay to the Attorney General there has been continuing harm to listed organizations and to their members, by the listing procedure which was action aptly characterized by Zechariah Caffee, Jr. Civil Liberties Under Attack, at p. 57:

> "It is something quite new to punish men drastically who have done nothing wrong, merely for fear that they might do something wrong."

Finally neither *Lindall v. Northern Pac. Ry. Co.*, 122 F. Supp. 253, D.C.D.C. 1954, 258, affirmed 223 F. 2d 316, 1955, cert. den. 350 U.S. 844, nor *National Lawyers Guild v. Brownell*, 225 F. 2d 552, D.C. Cir., 1955 cert. den. 351 U.S. 927, apply. In the former the unexplained delay was for over fifty years, and requisite harm followed. And delay alone is not laches, but merely raises an evidentiary question, *B-W Construction Co. v. United States*, 100 Ct. Cl. 227 (1943), *Kaiser Aluminum & Chem. Co. v. United States*, 36 U.S. Law Week 1094, 2363 (1967). In the *National Lawyers Guild* case there was a failure

to exhaust administrative review. Laches was not at issue. There is no basis for laches in the present case.

Alternatively,

> b. the period for seeking review was tolled, or the Attorney General is estopped from asserting laches.

As set out in the opening brief (p. 9), the action of the Attorney General tolled the period for seeking review, *Honda v. Clark*, 18 L. Ed. 2d 244 (1967). Alternatively, the Attorney General is estopped from asserting laches by his invitation for informal review, *H.S.D. Co. v. Kavanagh*, 191 F. 2d 831, 6 Cir., 1951, 846, *supra*, and *Bennet v. United States*, 371 F. 2d 859, 1967.

3. The relief granted below is inadequate.

The Attorney General, in his procedure for informal review, invited (Ex. C, pp. 29–30 J.A.)

> "new information that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate, but unanimous findings of three former Attorney Generals."

Petitioner submitted new information as to the propriety of the original designation in the *Thompson* case. In that case the entire history of the organization was put into issue by the government. The Court below decided that petitioner was entitled to relief, but only for a hearing for removal on changed circumstances, in effect requiring petitioner to concede to the propriety of the original listing (Opinion, Appendix p. 11). This relief is inadequate.

As stated above, the Attorney General is estopped from withdrawing the relief offered. More important, the Attorney General disregarded what this Court said in the *Joint Anti-Fascist* case, about his failure to comply with requirements of due process when the list was compiled under Executive Order

9835 and redesignated the organizations under Executive Order 10450 without notice, charges, or hearing.

The listing continues to cause harm by denying first amendment rights to listed organizations and to their members. This was recognized in the Opinion below (Appendix p. 2), and has been before this Court most recently in *Schneider v. Smith*, U.S. (1968) (36 U.S. Law Week 4131, 1/16/68), in *Cole v. Young*, 351 U.S. 536 (1956), and in the *Joint Anti-Fascist* case itself. And see *Keyshian v. Board of Regents of New York*, 385 U.S. 589, 1967, *Reed v. Gardner* (35 U.S. Law Week, 2277, 1967) *Shelton v. Turner*, 364 U.S. 479, 1960, and cases cited in petitioner's opening brief (p. 8–10).

The Attorney General should not be permitted to avoid review of the listing procedure, which has caused this harm, where no procedure consistent with due process for avoiding the listing ever was adopted. The Court below found that the Attorney General was arbitrary when he refused review for delisting. That same arbitrariness applies to review of the listing procedure itself and petitioner is entitled to review now.

CONCLUSION

The relief afforded below was inadequate. The action of the predecessors of the present Attorney General was in violation of the Fifth Amendment, and continues to cause harm in violation of the First Amendment and the Attorney General cannot avoid review by claiming laches. This Court should grant review, and declare the list void, invalid, and of no effect.

Respectfully submitted,

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